NO. 89-556

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In The
Supreme Court of the United States
OCTOBER TERM, 1989

STATE OF LOUISIANA, *ex rel.* WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF THE STATE OF LOUISIANA,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from a Three-Judge Panel of the United States District Court for the Eastern District of Louisiana

MEMORANDUM OF THE STATE OF LOUISIANA, EX REL. WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF THE STATE OF LOUISIANA, IN OPPOSITION TO GOVERNOR ROEMER'S MOTION TO DISMISS

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Pursuant to Rule 16.5, appellant State of Louisiana *ex rel.* William J. Guste, Jr., Attorney General of the State of Louisiana, files this Memorandum in Opposition to appellant Governor Roemer's Motion to Dismiss.

The pleadings filed by counsel for Governor Charles "Buddy" Roemer entitled "Motion to Dismiss" are an outrageous personal attack on the Chief Legal Officer of the State of Louisiana, William J. Guste, Jr. They are an egregious admixture of misstatement of fact, misapplication of law and political opportunism unbecoming of members of the Bar of this Court. That Governor Roemer would permit such tactics

before the highest Court of our Nation is regrettable.

This opposition to Governor Roemer's Motion to Dismiss is filed in order to correct these errors. The issues raised by the Governor's Counsel are *not* new but have been submitted to this Honorable Court in the pleadings and memoranda filed by the Attorney General, the Governor, and the Southern University Board of Supervisors in this Court's A-126 and A-127.

ARGUMENT

First. The Governor's Counsel says (Motion to Dismiss, p. 10): "Mr. Guste falsely asserted that '[he] did not and could not reasonably expect that the abolition of the four boards of higher education would become part of the remedial scheme actually ordered [by the trial court].'" The short answer—and all we need say here—is that Attorney General Guste sincerely believes, as we have shown in our Jurisdictional Statement,[1] that it was beyond the equitable, remedial authority of the district court to abolish Louisiana's multiple board higher education structure on the record below. Given this Court's ruling in *Minnesota State Senate v. Beens*, 406 U.S. 187, 197, 200 (1972), which the Governor's Counsel's Motion to Dismiss ignores, the Attorney General stands by his assertion and he disagrees entirely with the Governor's Counsel's view (State of Louisiana Opposition to Application for Stay, p.18) that "the remedy does not represent an over-intrusive infringement by a federal court on Louisiana's interest in managing its own affairs." Nowhere has Attorney General Guste denied knowing that the Governor and his counsel favored the single-board remedy. The supposed "bald

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[1] The Governor's Counsel's Motion to Dismiss falsely says that the Attorney General's Jurisdictional Statement "was authored by Mr. McGlinchey and the McGlinchey Law Firm." Motion to Dismiss, p. 6 n. 10. Lest there be any doubt in this Court's mind, Attorney General Guste and his staff personally drafted the Statement, ably assisted by Special Assistant Attorney General Paul R. Baier, a professor of law at the Paul M. Hebert Law Center, Louisiana State University.

assertion that he did not know about the single board issue," recited in the Governor's Motion to Dismiss, p. 12, comes out of thin air.

Second. As to the Governor's Counsel's accusation of "unexplained tardiness" (Motion to Dismiss, p. 21) in the Attorney General's challenge to the district court's decision,[2] the record shows conclusively that the Attorney General moved swiftly once the district court held that Louisiana's multiple-board system violated the Fourteenth Amendment. In doing so, Attorney General Guste was fulfilling his sworn duty and the obligations of his office to defend the Louisiana Constitution and state laws against unwarranted judicial attack. This is precisely what the Louisiana Constitution, Art. IV, Section 8, and state law, La. R.S. 49:257(B), require of him.

> "The 'standing' of a state official to defend against judicial orders that impinge upon the sovereignty of the State derives not from his individualized interest in the suit, but from the authority delegated to the official by the State's citizens to act on their behalf in upholding the laws enacted by their representatives."

Graddick v. Newman, 453 U.S. 928, 939 (1981) (Opinion of Justice Rehnquist). The minute entry of the district court of August 1, 1989, threw into doubt Southern University's standing to challenge the district court's decision. See Motion to Dismiss, p. 7 n.14. Given this surprising development, the Attorney General's Motion to Enroll Counsel of August 4, 1989, his notice of appeal of August 10, 1989, his application for stay directed to Justice White, and his supercession motion in this Court of August 16, 1989 can hardly be considered untimely.

Third. The Governor's Counsel concedes, as he must, that the Governor is sworn to uphold the Louisiana Constitution, but he says (Motion to Dismiss, p. 13 n. 18): "*If*, as

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[2] The Governor's counsel concedes that his Motion to Dismiss Attorney General Guste's appeal is itself untimely. Motion to Dismiss, p. 1. We make nothing of this, however, preferring to answer the Motion on its lack of merit.

the trial court found, the State's constitutionally mandated multi-board system promotes segregation, thereby creating a conflict between the state and federal constitutions, the Governor's obligation to support the federal constitution prevails pursuant to the Supremacy Clause of the Constitution of the United States." (Emphasis ours.) While we agree with this hornbook precept, it seems obvious to us that the Governor's "If" begs the very question presented. There is simply no relevant evidence in the record to show that Louisiana's multi-board system itself promotes unlawful segregation and discrimination in violation of the Civil Rights Act. Indeed, as Louisiana's Jurisdictional Statement shows, Louisiana is not in violation of this Act because there is no discrimination in higher education in Louisiana.

Fourth. As to the proper legal representative of the State in this case, the Governor's Counsel says (State of Louisiana Memorandum in Response to Motion to Supersede Counsel, p. 3): "According to both logic and Louisiana's constitution, the Governor, not the Attorney General, speaks for the State in this lawsuit and all others to which the State is a party." And again: "[T]he Governor, as Louisiana's chief executive officer, has the constitutional authority and responsibility to determine the position and policy of the State in this litigation and all others to which the State is a party or in which the State has an interest." Motion to Dismiss, pp. 13-14. Surely these are extravagant claims, given the constitutional and statutory duties of Louisiana's Attorney General as interpreted in an unbroken line of Louisiana case law.

A. Professor Hargrave, in the article cited in the Governor's Motion to Dismiss, p. 15, comments on the constitutional authority of the Attorney General under Article IV, Section 8, saying: "Subsection (1) in referring to his power to institute, prosecute or intervene in any civil action or proceeding is a continuation of prior provisions and is unlimited." Hargrave, *The Judiciary Article of the Louisiana Constitution of 1974*, 37 La. L. Rev. 765, 835 (1977). It has always been the law in Louisiana that "it is the duty of the Attorney General and his assistants to prosecute and defend all suits

or other legal proceedings to which the state is a party, and to have charge of all legal matters in which the state, as a distinct entity, apart from other entities or corporate agencies it may create, has an interest." *Saint v. Allen*, 134 So. 246, 248-49 (La. 1931). *Accord, State ex rel Porterie, Attorney General v. Walmsely*, 160 So. 91 (La. 1935):

> "This is a suit by the state, and by the Attorney General, in his official capacity, he being charged with the duty of representing the state in all judicial proceedings in which the state has an interest, either as plaintiff, defendant, or intervenor."

And again:

> "The Attorney General has unquestionably the right to file suit in the name of the State and he is not required to obtain the permission of the Governor or any other executive or administrative officer or board in order to exercise it. This power and duty is inherent in him in the nature of things and has been specially charged to him by the people themselves in the Constitution."

State v. Texas Co., 7 So.2d 161, 162 (La. 1942). That the Attorney General is the proper legal representative of the State in judicial proceedings is of venerable lineage in Louisiana, tracing back to Francois-Xavier Martin's pronouncement for the Louisiana Supreme Court in *State v. Bank of Louisiana*, 5 Mart. (N.S.) 327, 344 (1827): "The authority of the attorney-general to prosecute or defend any suit, in which the state is concerned, does not, however, result from mere presumption. It is necessarily implied from the nature of his office, and is expressly given by the act of assembly defining his duties." Under previous statutory authority no different in substance from that governing today,

> "it is equally clear and undoubted that he has the capacity to appear in this court and represent the interest of the state in any given controversy. . . . There is no question of the authority of the attorney general, under these statutes, to prosecute the present appeal, and that power and authority necessarily draw to them authority and power to obtain an order of appeal."

State v. Reid, 12 So. 189, 190 (La. 1893). The controlling statute in *Reid* authorized the Attorney General to institute and prosecute "any and all suits he may deem necessary for the protection of the interests of the state." Section 1, Act No. 65 of 1884, quoted in *Reid, supra*, at 190. This is precisely the duty of the Louisiana Attorney General under Article IV, Section 8 of the Louisiana Constitution of 1974, *viz.*:

> "As necessary for the assertion or protection of any right or interest of the state, the attorney general shall have authority (1) to institute, prosecute, or intervene in any civil action or proceeding. . . ."

The statutory duty of the Attorney General remains the same today, exactly as it was a hundred years ago: "The Attorney General may institute and prosecute any and all suits he may deem necessary for the protection of the interests and rights of the state." La. R.S. 13:5036.

B. We acknowledge the jurisprudence that where the Legislature creates a corporate agency such as the Board of Highways, the agency may employ its own counsel to represent its interests.[1] This is the rule of *Saint v. Allen*, 134 So. 246 (La. 1931), reaffirmed in *State ex rel. Guste v. Board of Highways*, 275 So.2d 207 (La. App. 1973). *Accord, Ricks v. Department of State Civil Service*, 8 So.2d 49, 60 (La. 1942). But the Governor's Counsel can take no solace in these cases here, where the State "as a distinct entity," *Saint v. Allen, supra* at 249, is named as a party defendant and where Louisiana's constitutional and statutory provisions are attacked by judicial orders that impinge upon its sovereignty. It is the duty of the Attorney General, not the Governor, to represent Louisiana in this situation. See La. R.S. 49:257(B). *Kemp v. Stanley*, 15 So.2d 1, 9 (La. 1934), upon which the Governor relies (Motion to Dismiss, p. 14), deals with "the power allocation between the attorney general and the district attorneys," Hargrave, *Louisiana Constitutional Law*, 42

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[1] Unless supercession is warranted under Article IV, Section 8 of the Louisiana Constitution of 1974. *Cf.* Act 448 of 1988.

La. L. Rev. 596, 606 (1982), a matter likewise inapposite here.

Nor is *State ex rel. Guste v. Texaco Co., Inc.*, 433 So.2d 756 (La. App. 1st Cir., 1983) applicable. Then Governor David Treen intervened in that case as a party through counsel representing him personally. He did not purport to provide legal representation for the State itself as a distinct entity. Governor Roemer is not a party to this litigation.

C. We do not deny the power of the Legislature or of the Governor to employ special counsel in aid of the duties of their respective offices. See *Joint Legislative Committee v. Fuselier*, 174 So.2d 817, 820 (La. App. 1965) ("Under the division of the departments of government, the Legislature is free and at liberty to seek and retain Committee counsel apart from the office of the Attorney General."). And we most assuredly make no claim—contrary to the Governor's hyperbole—that once the Attorney General enters a case to which the State is a party he "becomes the sole repository of the executive power of the State." State of Louisiana Memorandum in Response to Motion to Supersede, p. 3.

D. What we do say is that, under Louisiana's Constitution and law, Louisiana's Attorney General is plainly required to defend Louisiana's Constitution and its statutes against the attack of the district court below. He is the proper legal representative of the State of Louisiana on appeal to this Court, notwithstanding the contrary plea of the Governor's Counsel, who has turned his back on these same provisions. *Accord, Feeney v. Commonwealth*, 366 N.E.2d 1262 (Mass. 1977) (Attorney General authorized to prosecute appeal to United States Supreme Court over objections of Governor). See also *Secretary of Admin. & Fin. v. Attorney General*, 326 N.E.2d 334, 339-40 (Mass. 1975).

Fifth. The Governor's Counsel is wrong, we respectfully submit, to say (Motion to Dismiss, p. 19) "the issue is who establishes policy for the state in litigation"; and he is wrong again to say "Mr. Guste really is asking to have his policy choices predominate over those of the Governor" (Motion to

Dismiss, p. 20). The people of Louisiana have established as *their* constitutional policy choice a multiple board governing system for higher education. That choice is the organic law of the State which it is the duty of the Attorney General and the Governor to support. Article X, Section 30, Louisiana Constitution of 1974. See also *State v. Smith*, 162 So. 413, 419-20 (La. 1935). Surely the Governor's present political preference for a single board cannot override the constitutional choice of the people of Louisiana, a choice the Attorney General is obliged to defend in court as the chief legal officer of the State. *Accord, E.P.A. v. Pollution Control Bd.*, 372 N.E.2d 50 (Ill. 1977); *Conn. Com'n v. Conn. Freedom of Information Com'n*, 387 A.2d 533 (Conn. 1978).

Sixth. *People ex rel. Deukmajian v. Brown*, 624 P.2d 1206 (Cal. 1981), which the Governor's counsel cites, is clearly distinguishable. Attorney General Guste has not sued the Governor; nor is Attorney General Guste guilty of any ethical impropriety in this case. Rather, as an accommodation to Governor Roemer, the Attorney General permitted the Governor's counsel to advocate a single-board remedy before the district court, but the Attorney General never abandoned his position that such a remedy would violate the State Constitution and was impermissible. The Attorney General did not advise the Governor to the contrary, as was the case in *Deukmajian v. Brown*. At any rate, "we are not dealing with private lawyers. Rather, different ethical considerations are at stake here." *Superintendent of Ins. v. Attorney General*, 558 A.2d 1197, 1202 (Me. 1989). The majority of courts confronting similar issues have recognized the unique status of the Attorney General. *Id.* at 1203. "This special status of the attorney general—where the people of the state are his clients—cannot be disregarded in considering the application of the provisions of the code of professional responsibility to the conduct of his office." *Conn. Com'n v. Conn. Freedom of Information Com'n, supra*, at 537. Attorney General Guste is guilty of no ethical breach here. To the contrary, he is fulfilling his constitutional and statutory duties to defend the State's Constitution and its laws faithful to the sovereign will of the people of Louisiana.

Seventh. As to the proper forum to resolve the question of "cause" for supersession—a question of procedure, not substance—we submit that Article IV, Section 8(3) contemplates continuing authority over the controversy in the court "which would have original jurisdiction." This provision was not written with a question of supersession on appeal in mind. The jurisdiction of the district court ceased upon filing of the State's notice of appeal on August 10, 1989. Thus, as a matter of both state and federal law, see 28 U.S.C. § 1651, this Court is the proper forum to resolve the ancillary matter of supersession now pending before it on appeal, Case No. A-126, in aid of its jurisdiction on appeal.

Eighth. All we will say about the suggestion by the Governor's counsel that Attorney General Guste is guilty of "conduct unbecoming a member of this Court," Motion to Dismiss, p. 29, misquoting Rule 8 of the Rules of this Court ("conduct unbecoming a member *of the Bar* of this Court"), is to respectfully—but firmly—deny the accusation. Attorney General Guste has ably represented the people of Louisiana, including appearances at the Bar of this Court, for seventeen years. We will say nothing more.

CONCLUSION

It is simply not true that "the Governor, not the Attorney General, has authority to speak for the State in all matters of litigation." State of Louisiana Memorandum in Response to Motion to Supersede, p. 8 n.10. Louisiana's Constitution, her statutes, and her case law plainly compel the contrary conclusion, especially here where the Governor willingly accepts the dismantling by federal court order of Louisiana's constitutionally mandated system of higher education.

For the foregoing reasons, this Court should deny the Motion to Dismiss Appeal of William J. Guste, Jr. Probable jurisdiction should be noted. The Motion to Supersede Counsel for the State of Louisiana, previously filed with the Court,

should be granted, save striking the response filed by said counsel in opposition to the State *ex rel.* Guste's motion for stay, which is moot.[4]

Respectfully submitted,

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[4] The Attorney General has no objection to the Governor appearing here as *amicus curiae* to express his views in support of the district court's judgment on remedy. See *United States v. Providence Journal Co*, 485 U.S. 693, 704 (1988). In fact, the Attorney General proposed such a procedure in a spirit of compromise by letter to Governor Roemer dated September 29, 1989, Appendix A, *infra*, p. 1a, and in a personal meeting with the Governor.

APPENDIX

APPENDIX A

State of Louisiana
DEPARTMENT OF JUSTICE
Baton Rouge
70804
September 29, 1989

Honorable Buddy Roemer
Governor, State of Louisiana
State Capitol
Baton Rouge, Louisiana 70804

Dear Governor Roemer:

It is vital that Louisiana present as united a front as possible in the higher education desegregation case now before the Supreme Court. I, therefore, want to avoid what would be an unseemly struggle between your office and mine regarding representation of the State's interests before the Supreme Court.

It would be appreciated very much if you will meet with me as soon as possible (Tuesday coming). I want to work out a mutually satisfactory arrangement regarding representation of the State's positions, including yours, before the Supreme Court.

It is my hope that we can reach an agreement that is satisfactory to both of us. If this were possible, I could withdraw the motion to supersede your counsel that I have filed in the Supreme Court. The issues before the Court in the desegregation case are too important in their own right to be clouded by a jurisdictional fight between our offices at the bar of the Supreme Court.

Sincerely,

/s/ William J. Guste, Jr.

WILLIAM J. GUSTE, JR.

WJG,Jr-sl

cc: John N. Kennedy
P.J. Mills